Supreme Court of the United States

OCTOBER TERM 1951

No. 719

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, a voluntary association, and ALBERT J. FITZGERALD, JULIUS EMSPAK and JAMES J. MATLES, as members thereof and as representatives of all of the members and locals thereof, *Petitioners,*

against

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (CIO), a voluntary association; and JAMES E. CAREY and MICHAEL FITZPATRICK, as members thereof and as representatives of all of the members and locals thereof, Local 410, Bloomfield, N. J., and Belleville, N. J., and ARTHUR MCBRIDE and PHILIP COSIMANO, members thereof and as representatives of all of the members thereof, Local 426, Newark, N. J., and MAURICE VENERIE, as a member thereof and as a representative of all the members thereof, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The United Electrical, Radio and Machine Workers of America, and Albert J. Fitzgerald, Julius Emspak and James J. Matles, as members thereof and as representa-

tives of all of the members and locals thereof, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (R.220), affirming the judgment of the District Court for the Western District of Pennsylvania dismissing the complaint herein.

Opinions Below

The opinion of the Court of Appeals (R.216) is not yet reported. The opinion of the district court granting plaintiff's motion to dismiss the complaint (R. 146) is reported at 99 F. Supp. 967.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 21, 1952. The jurisdiction of this Court is invoked under Title 28, Section 1254, of the Judicial Code.

Preliminary Statement

A—The Proceedings Below

Plaintiff-Respondent, the Westinghouse Electric Corporation, instituted this interpleader action on May 26, 1950, under Section 1335 of the Judicial Code (R. 2), depositing $270,403.25 in the registry of the District Court for the Western District of Pennsylvania (R. 21). This sum consisted of union dues deducted from the wages of employees pursuant to a collective bagaining contract (R. 17).

Defendant-Petitioner, the United Electrical, Radio and Machine Workers of America, hereinafter referred to as UE, a national trade union and its subordinate locals, and Defendant-Respondent, the International Union of Electrical, Radio and Machine Workers of America, CIO, here-

inafter referred to as IUE, a rival union, and its subordinate locals, were joined in the action as claimants to the fund (R. 2).

IUE moved to dismiss the interpleader complaint on the grounds *inter alia* of *forum non conveniens* (R. 58). Westinghouse vigorously opposed this motion (R. 61), and the motion to dismiss was denied by the lower court (R. 72). Almost a year later, after answers and counterclaims were filed by the defendants, plaintiff Westinghouse moved for a dismissal of its own action on the same grounds of *forum non conveniens* (R. 135). The district court granted this motion (R. 151) and defendant-petitioner UE and its subordinate locals appealed from this order to the Court of Appeals for the Third Circuit. The Court of Appeals affirmed the judgment of the district court (R. 220), but stayed its mandate pending the disposition of this petition for writ of certiorari.

B—Statement of Facts

Plaintiff-Respondent Westinghouse Electric Corporation, is a corporation organized under the laws of the State of Pennsylvania with its principal place of business in Pittsburgh, Pennsylvania (R. 2). Westinghouse Electric Corporation is engaged in the manufacture, sale and repairing of electrical machinery, equipment and devices, with plants in Pittsburgh, East Pittsburgh, Philadelphia and Sharon, Pennsylvania; Springfield, Massachusetts; Buffalo, New York; Bloomfield, Belleville, Newark and Jersey City, New Jersey; Cleveland, Lima and Mansfield, Ohio; St. Louis, Missouri; and Fairmont, West Virginia (R. 3).

The Defendant-Petitioner, United Electrical, Radio and Machine Workers of America, is a labor organization of hundreds of thousands of men and women employed in the electrical, radio and machine industries, members of which are residents of states throughout the country (R. 109). UE was certified and recognized as the bargaining agent

of the employees of plants of the Westinghouse Electric Corporation for the period involved in the present proceedings (R. 108) and has consummated collective bargaining agreements with Westinghouse Electric Corporation covering the employees at the Westinghouse plants throughout the country (R. 110).

The Defendant-Respondent, International Union of Electrical, Radio and Machine Workers, CIO, was organized in November 1949, as a rival labor organization in the electrical, radio and machine industries (R. 6).

On April 1, 1947, a collective bargaining contract was entered into between the Westinghouse Electric Corporation acting on behalf of itself and the UE acting on behalf of and in conjunction with its various Westinghouse locals (R. 110). This contract was modified on April 1, 1948, and its duration extended until March 31, 1950 (R. 111). The contract and its supplements were signed in Pittsburgh, Pennsylvania (R. 110). The UE, until the expiration of the contract, was the certified and recognized bargaining agent of all of the Westinghouse employees, except for certain crafts in a few plants (R. 110, 111). Since that time UE has been certified as collective bargaining agent for approximately fifty percent of the Westinghouse Electric Corporation employees.

On April 1, 1948, the parties to the contract agreed upon a dues deduction authorization as contained within the national agreement between the UE and Westinghouse Electric Corporation, under the terms of which Westinghouse was to deduct and transmit to the UE each month the union dues of those employees who had signed a dues deduction authorization (R. 111, 112, 113). Subsequent to April 1, 1948, a vast majority of employees executed the dues check-off forms. The vast majority of authorizations remained in full force and effect at all times between July 1, 1948, and March 31, 1950 (R. 113). The dues so deducted and transmitted to the UE were used, under the terms of the constitution of the UE, for the administration of the national union and its subsidiary locals (R. 113).

Between November 1, 1949, and March 31, 1950, during which time the national agreement between the UE and Westinghouse was in full force and effect, the Westinghouse Electric Corporation withheld from the wages of the employees the sums which were authorized under the dues deduction authorizations, but failed and refused to transmit to the UE through its authorized locals the monies so withheld (R. 114, 115). The UE and its locals have at all times asserted and continue to assert a claim to all of the monies which have been improperly withheld by Westinghouse (R. 115).

Westinghouse, on May 26, 1950, instituted this interpleader action under the terms of Section 1335 of the United States Judicial Code, and in accord with an order of the court, deposited the monies withheld in the amount of $270,403.25 in the registry of the Federal District Court for the Western District of Pennsylvania, wherein said action was instituted. Westinghouse in its action asked that the court determine who was entitled to the funds in view of the conflicting claims of the UE and the IUE. UE and IUE and their subsidiary locals covering Westinghouse employees were made parties defendant.

Westinghouse claimed it was in doubt as to who was entitled to the possession of these monies because of the existence of these two rival labor organizations in the electrical industry. In April of 1950 the IUE had instituted five individual suits against Westinghouse in five states, seeking to obtain part of the monies on the theory that the IUE locals stood as successor in interest to the UE locals (R. 17, 18, 19, 20). Two of these actions were instituted in state courts and three of the actions were instituted in federal district courts.

Westinghouse removed the two state actions to the federal courts (R. 18, 20). UE was not and since that time has not become a party in any of the five actions.

In the complaint Westinghouse alleged that it had been advised that the locals of the IUE were to institute addi-

tional individual actions for the monies withheld which would in all probability result in thirteen separate law suits on the part of the IUE locals (R. 20). Westinghouse further alleged that the UE asserts its claim to the entire sum of money on behalf of itself and its locals and that

> "unless the conflicting rights and demands of the several defendants in and to the sum of money aforesaid can be determined and adjudicated in some single proceeding before this court or some other competent court, the plaintiff will be subjected to the necessity of defending a multiplicity of suits and to grave risks that it may be required by the adjudication of different courts to sustain and discharge double or multiple liabilities, that it will be subjected to great and unnecessary cost and expense and that it may suffer other irreparable injuries" (R. 21).

Westinghouse requested an injunction against the defendant unions restraining them from instituting any action or prosecuting any action already instituted for the monies withheld. The district court in its order of May 26, 1950, granted this relief and accordingly enjoined the defendants from instituting or continuing any actions for the monies constituting the dues deductions from the Westinghouse employees (R. 48-50).

The IUE on July 5, 1950, moved to dismiss the interpleader action on the ground *inter alia* of *forum non conveniens*.

Westinghouse opposed in all respects the motion of the IUE, as did the UE (R. 61-69).

The plaintiff-respondent in its brief and arguments in opposition to the IUE motion to dismiss, transfer or sever on the grounds of *forum non conveniens* maintained that there was no basis in law and fact for the plea of inconvenient forum. Westinghouse, in response to the IUE contention that it would be required to bring witnesses from seventeen different plants, declared in its brief:

> "* * * it may be well even at this stage of the matter to point out that the facts asserted by Mr. Sigal

(attorney for IUE) are apparently not sufficient to justify either a dismissal of the action or its severance into parts and the transfer of various such parts to other districts.

"A dismissal would be improper and unwarranted for at least two reasons: first because if the jurisdictional facts exist as they do here the plaintiff has a legal right to a decree of interpleader in some district court—either this or some other (see *Railway Express Co.* v. *Jones, et al.*, 106 F. 2d 341, 7 C. C. A. 1939); and secondly, because under the practice established by the present Judicial Code (28 U. S. C. 1404) an action brought in the wrong district cannot be dismissed but can only be transferred to a proper district * * *.

"The plaintiff has nothing to gain in this case except freedom from the expense, vexation and risk of taking part in a number of cases at scattered places. In contrast the defendants have large material gains in prospect. If their claims are valid the defendant IUE locals may hope to recover the entire $270,403.25, a sum which certainly justifies a substantial expenditure of money and energy.

"Secondly, the doctrine of forum non conveniens can properly be applied to the transfer of an action only where it appears that the plaintiff has chosen to bring his suit in a district which must have been chosen simply to harass or oppress the defendant * * *.

"In the present case the plaintiff has chosen the judicial district where the checkoff contract was made; where a majority of the employees concerned reside; where the major portion of the fund in controversy was earned; and where its own offices and principal records are located. The location is as central to all of the other parties as any other could be * * *. *In short, plaintiff here has chosen that venue which is not only most economical and advantageous to itself, but also more economical and more advantageous to the interests of the several defendants than any other single district could be.*" (Emphasis added.)

This was the formal position of the Westinghouse Electric Corporation in response to the IUE motion to dismiss on the grounds of *forum non conveniens.*

Westinghouse stated further in response to the contention of the IUE as to *forum non conveniens* (R. 63):

> "If the facts concerned in this matter are to be considered in the determination of this case and if it appears that the presentation thereof is made difficult by the circumstances that the witnesses are residents of numerous widely scattered places, the plaintiff stands ready to develop the facts, or such as continue to be the subject of controversy, either by way of interrogatories or by taking depositions of the qualified witnesses at such place or places as shall prove to be convenient to all of the parties to this case."

As further ground for opposing the IUE motion to dismiss, Westinghouse stated in an affidavit by Clark C. Frame that the fund in issue was a single fund, title to which is litigable in one forum (R. 62):

> "I deny the averment of Mr. Sigal in the affidavit that said sum of $270,403.25 is not in fact a single fund. It was accumulated as a whole pursuant to the provisions of a single contract, to wit, the plaintiff's agreement of April 1, 1947 with the UE, Exhibit A attached to the complaint. It has been claimed as a single fund by the UE as distinguished from the UE locals. Attached hereto marked Exhibit B * * * is a true copy of a letter addressed to the plaintiff by the General Counsel of the UE on May 17, 1950 which states that 'the UE international, of course, has a claim in respect to such funds based on per capita payments, etc. * * *' * * * Every instance on which there has been any occasion to state its position, the UE has made known to the plaintiff that it has claims to the entire fund which has been paid into court which are independent of the possible claims of its subsidiary locals."

On August 11, 1950, the district court by Marsh, *J.*, issued an opinion and order denying the IUE's motion to dismiss on the ground *inter alia* of *forum non conveniens,* and holding that the court had jurisdiction over the complaint. The court further directed the defendants to answer the complaint within 30 days thereafter, subsequent to which a hearing on the interpleader would be held (R. 48-50).

On September 28, 1950, defendants IUE filed an answer to the complaint of Westinghouse wherein they asserted a claim to funds deposited in the federal registry (R. 89-104).

IUE in its answer counterclaimed against Westinghouse in the amount of $62,274 (R. 78-107).

On October 2, 1950, UE filed an answer asserting its claim to the entire fund of $270,403.25 and asserted an affirmative counterclaim in the amount of $62,274 (R. 108-129).

The counterclaims of $62,274 asserted by both UE and IUE arose out of the background of confusion created by the claims of the IUE. Upon its organization in November, 1949, the IUE made claim to be the collective bargaining agent. So as to prevent unnecessary delays in production and to stabilize labor relations at the Westinghouse plants, an agreement was consummated between Westinghouse, UE and IUE that payments for duly authorized lost time would be made to those workers who were union representatives as of November 1, 1949. Under the terms of the national agreement the union and the company share the cost of lost time for union activities incurred in the Westinghouse plants.

Westinghouse stated formally that it was prepared to pay the additional sum involved in the counterclaim into the registry of the court, should it be determined after hearing that the company's right to deduct this sum was open to question.

Westinghouse in its reply brief to the IUE motion to dismiss stated:

> "It is possible that the defendants' objection is based upon the plaintiff's failure to pay into court the sum of $62,274 withheld in the manner described above as the union's one-half share of the monies paid union representatives for working hours expended in union activities. The plaintiff's right to credit that sum had not been questioned by anybody until the motion to dismiss was filed. It is questioned in general terms by the affidavit of Benjamin C. Sigal tendered in support of the motion to dismiss. *If Mr. Sigal's question*

is pressed by his client and if it be held after hearing that the plaintiff's right to this credit is open to question, the plaintiff will seek leave to amend its complaint to add the $62,274 to the fund involved in the case and will at the same time either pay the additional sum into court or file such bond as the law may require" (emphasis added).

Thus, Westinghouse in its argument and brief made clear that it would, even at the expense of adding $62,274 to the federal registry, maintain its status as a stakeholder in this action.

On April 21, 1951, eleven months after the institution of the interpleader action, eight months after the decision of the court on IUE's motion to dismiss, and six months after the filing of answers and counterclaims, the Westinghouse Electric Corporation, although it instituted this action on its own accord in a forum of its own choosing, the district of its principal office and place of business, and in the state of its incorporation, and in the federal district wherein more than fifty per cent of the funds in controversy were located, filed a motion to discontinue and dismiss its interpleader action on the grounds of *forum non conveniens.*

This untimely plea of an inconvenient forum by the plaintiff-respondent Westinghouse was vigorously opposed by the UE (R. 66-69, 140-145). It was supported by the IUE.

In the affidavit of William E. Miller setting forth the facts warranting dismissal on the grounds of *forum non conveniens,* Westinghouse failed to state or claim any change in facts or circumstances warranting its reversal of position. Westinghouse alleged in this affidavit that because of the counterclaim, it would be necessary for Westinghouse to bring as witnesses accountants and others from its various plants to the district court in Western Pennsylvania.

The Court of Appeals for the Third Circuit affirmed the judgment of the district court granting Westinghouse's

motion for an order of dismissal, but stayed the mandate of the court pending a determination by this Court of this petition for writ of certiorari.

Statutes Involved

28 U. S. C. 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931.

Rule 13 of the Federal Rules of Civil Procedure. Counterclaim and Cross-Claim.

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

Rule 41 of Federal Rules of Civil Procedure. Dismissal of Actions.

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plain-

tiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

28 U. S. C. 1404. Change of venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending. June 25, 1948, c. 646, 62 Stat. 937.

Questions Involved

1. Whether a claim against a plaintiff in a federal interpleader action which arises out of the transaction or occurrence which was the subject matter of the original action is a counterclaim within the meaning of Rule 13 of the Federal Rules of Civil Procedure?

2. Whether a counterclaim for additional relief asserted by a defendant in a federal interpleader action against the stakeholder-plaintiff is a counterclaim within the meaning of Rule 41(a)(2) of the Federal Rules of Civil Procedure so as to preclude voluntary dismissal of the action?

3. Whether Section 1404 of the Federal Judicial Code precludes a dismissal of an action by a plaintiff when the dismissal is sought solely on grounds of inconvenient forum?

Summary Statement of the Matter Involved

The questions here presented involve important problems in the administration of the federal interpleader statute. The threshold problem in this petition centers around an analysis of the initial stages of a federal interpleader proceeding.

In its initial complaint for interpleader, plaintiff-respondent, Westinghouse, deposited $270,403.25 in the registry of the district court asserting that this was the amount of money owed to either defendant UE and/or its locals, or defendant IUE and/or its locals (R. 2). Following a direction of the district court, the defendants to the interpleader action answered the complaint, setting forth their claims to the money involved. In addition, defendant UE filed a counterclaim against plaintiff Westinghouse in the amount of $62,274. IUE likewise filed a similar counterclaim. Defendants UE and IUE asserted in these counterclaims that an additional amount of money was due and owing under the national agreement authorizing the deduction of union dues from plaintiff's employees.

Thus, at the time of serving the answer, the UE and the IUE asserted claims for $62,274 arising out of the transaction or occurrence which was the subject matter of plaintiff Westinghouse's claim for interpleader relief.

Plaintiff-respondent Westinghouse, after almost a year's delay, sought a voluntary dismissal under Rule 41(a)(2).

The petitioner UE objected to dismissal *inter alia* on the ground that the pending counterclaims barred dismissal under Rule 41(a)(2). Rule 41(a)(2) states:

> "If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion

> to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court."

The Court of Appeals held as a matter of first impression that Rule 41(a)(2) did not apply since affirmative claims for additional relief asserted against a plaintiff in an interpleader action are not true counterclaims.

This petition thus raises before this Court the question as to whether a claim against the plaintiff in a federal interpleader action arising out of the transaction which was the subject matter of the original interpleader action is a true counterclaim within the meaning of Rule 13 and Rule 41(a)(2) of the Federal Rules of Civil Procedure.

The petition also raises an additional question not yet decided by this Court. The plaintiff having chosen his own forum and having resisted a prior motion to dismiss for inconvenient forum reasons, almost a year after the inception of the action, sought to dismiss his own action solely upon the grounds of a plea of *forum non conveniens*. The petition thus raises the question as to whether the policies embodied in Section 1404 of the Federal Judicial Code preclude a dismissal of an action by a plaintiff when dismissal is sought solely on grounds of inconvenient forum.

Reasons for Granting the Writ

I.

There are presented here for decision several important questions which have not been, but should be, settled by this Court. These issues involve important questions of federal law which have not been, but should be settled by this Court. These questions involving the administration of federal law have been decided in a way probably in conflict with the applicable decisions of this Court and in conflict with the decisions of other Courts of Appeal.

II.

In affirming the district court's order of dismissal, the Court of Appeals found it necessary to carve a wholly unprecedented exception into the hitherto clear meaning of Rules 13 and 41(a)(2) of the Federal Rules of Civil Procedure. The Court of Appeals found it possible to avoid the direct mandate of the Federal Rules only by holding as a matter of first impression that affirmative claims for relief directed against a plaintiff in a federal interpleader action are not "counterclaims" within the meaning of Rules 13 or 41(a)(2).

We suggest that this novel exception to the Federal Rules enunciated by the Court of Appeals is wholly unsupported by authority and contrary to the letter and spirit of the Federal Rules of Civil Procedure here involved.

Rule 13 of the Federal Rules of Civil Procedure defines a compulsory counterclaim as:

> "Any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *."

Until the decision of the Court of Appeals in this matter, there has never been the slightest suggestion that Rule 13 was qualified by an unwritten proviso excepting from its general reach and scope federal interpleader actions. Until this opinion, Rule 13 has always been applied on its face without reservation to the determination of whether a counterclaim has been made in a federal interpleader action. The Court of Appeals for the Eighth Circuit, recently in *Coastal Air Lines, Inc.* v. *Dockery,* 180 F. 2d 874, (CA 8), in testing the presence of counterclaims in interpleader actions, inquired "whether the claims arose 'out of the transaction or occurrence' which was 'the subject matter of the original action'." The Court of Appeals for the Third Circuit in affirming the order of dismissal in this action, has rejected this test and has written a new and, we

suggest, unwarranted exception to the sweep of Rule 13. The normal test envisioned by Rule 13 would require a finding that the additional affirmative claims for relief of $62,274.00, asserted by UE and IUE against the plaintiff, constituted proper counterclaims. Until the opinion of the Court of Appeals, the only criteria ever suggested in applying Rule 13 or Rule 41(a)(2) was an examination into whether the claim arose out of the transaction or occurrence which was the subject matter of the original action. In the instant case, neither the respondents nor the court below argued that these additional affirmative claims for relief did not arise out of the transaction which was the subject of the interpleader action. The only rationale offered for this novel approach to Rule 13 and Rule 41(a)(2) is the suggestion that the counterclaims here are not true counterclaims within the meaning of Rule 13 because their very assertion may conceivably destroy the interpleader action itself, should the plaintiff refuse at a later date to increase the deposit in the court.*

Until this opinion, there has been no suggestion in the decisions of this Court or of any of the federal courts that the plain words of Rule 13 and Rule 41(a)(2) did not apply

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* We suggest that this fear as to the jurisdictional effects of the asserted counterclaims is unfounded in light of the present record. The Court of Appeals indicates that the assertion of the counterclaims might at some later stage destroy the jurisdiction of the court to proceed with the entire interpleader action. The court argues that should Westinghouse refuse to secure or pay the disputed additional funds into court, the action might have to be dismissed because of the lack of an essential jurisdictional element. The court relies on *Ednor* v. *Massachusetts Mutual Life Insurance Co.*, 138 Fed. 2d 327 (C. A. 3).

However, as the district court itself pointed out in its original opinion denying IUE's motion to dismiss, should it ultimately be determined on a hearing that the counterclaim for $62,274 is justified, the plaintiff will "then be able to amend and pay the additional amount into court or post a bond to secure same." As a matter of fact, plaintiff Westinghouse formally stated to the district court that should the counterclaim be sustained, it was prepared to "either pay the additional sum into court or file such bond as the law may require."

to federal interpleader actions. One of the few federal decisions dealing directly with this question is the leading opinion of Judge Learned Hand, sitting as District Court Judge in *Sherman National Bank of New York* v. *Schubert Theatrical Co.*, 238 Fed. 225 (S. D. N. Y. 1916), affirmed 247 Fed. 256. The *Sherman National Bank* case involved a petition for a bill of interpleader. Judge Hand held *inter alia* that even where a plaintiff has an interest in a fund or where the amount of the fund is contested, counterclaims may be presented by the interpleaded defendants against the plaintiff-stakeholder. Judge Hand's opinion concluded with a direction that

> "The parties must prepare and serve their counterclaims against each other * * * if any of the Schubert Theatrical companies (defendants) has any claim against the *plaintiff* * * * it may do the same."

Judge Hand's opinion in the *Sherman National Bank* case has been cited approvingly by this Court in one of its leading discussions of interpleader practice, *Texas* v. *Florida*, 306 U. S. 398.

The broad principle underlying Rule 13 does not justify the exception carved into it by the opinion of the Court of Appeals. The definition of counterclaim contained in Rule 13 is sweeping in its scope and does not support any inference of limitation. As Professor Moore states in his treatise on federal practice:

> "*Any claim* which a defendant has against a plaintiff is a counterclaim." (3 Moore's Federal Practice, 2nd Ed., p. 8). (Emphasis added.)

Again Professor Moore states:

> "Under this Rule, a counterclaim is any claim including set-off and recoupment which one party has against an opposing party" (supra, p. 8).

Rule 13, while modelled on former Equity Federal Rule 30 (see original Committee Note of 1937 to Rule 13), was

broadened and liberalized in many respects. There is no warrant in the history of Rule 13 or in its application and interpretation by the courts to exclude from its scope federal interpleader actions. Since the affirmative claims for relief against the plaintiff filed by the defendants IUE and UE, arose out of the transaction or occurrence which was the subject matter of the original interpleader action, they constitute counterclaims within the meaning of Rule 13 of the Federal Rules of Civil Procedure.

Since these affirmative claims for relief are properly counterclaims, the Court of Appeals erred in failing to enforce the mandate of Rule 41(a)(2).* The salutory purpose of Rule 41(a)(2) is to prevent a plaintiff from destroying the right of the defendant to litigate a claim against that plaintiff once the claim has been asserted. 5 Moore's Federal Practice, 1032. The Rule that an action will not be dismissed in the presence of a pending counterclaim, reflects the principle that voluntary dismissal should never be granted in the face of legal injury to a defendant. *Pullman Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *Leach* v. *Ross Heaters Mfg. Co.*, 104 F. 2d 88 (CA 2); *Deauville Corp.* v. *Garden Suburbs Golf & Country Club,*

* The plaintiff could not dismiss the interpleader action as a matter of right. Rule 41 of the Federal Rules of Civil Procedure sets forth the conditions under which a party seeking affirmative relief may discontinue and dismiss its action. Rule 41(a)(1) permits dismissal of an action by a plaintiff by the filing of a notice of dismissal "at any time before service by the adverse party of an answer * * *." Rule 41(a)(2) provides that subsequent to the filing of an answer the action may be dismissed only upon the order of the court.

The district court in denying the IUE's motion to dismiss on August 11, 1950, ordered the defendants UE and IUE to file answers to the complaint of the plaintiff Westinghouse. Such answers were filed by both UE and IUE. Each of the answers filed asserted counterclaims for affirmative relief. (R. 78-107, 108-129). Plaintiff moved the court for dismissal of its action after the parties in the proceeding had served and filed their respective answers and counterclaims.

Under Rule 41, therefore, plaintiff's motion to dismiss could not have been granted as a matter of right.

165 F. 2d 432 (CA 5); *Butler* v. *Denton*, 150 F. 2d 687 (CA 10).

Rule 41(a)(2) thus stands for the proposition that a plaintiff may not voluntarily withdraw an action once an opposing party has asserted an affirmative claim for relief. It is no answer to the principle underlying Rule 41(a)(2) to argue that relief may not ultimately be available for the counterclaim. In the first place, as we have indicated, there is no indication in this record that the jurisdiction of the court over the interpleader action would have been destroyed by the counterclaims. Secondly, it is clear that even if the plaintiff had withdrawn its offer to pay in the additional sums of money or file the appropriate bond, independent jurisdiction over the counterclaim would have been vested in the court by Section 301 of the Labor Management Relations Act. The action would then become a bill in the nature of interpleader with an independent basis for federal jurisdiction under Section 301 of the Labor Management Relations Act, which provides:

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Court of Appeals would seem to infer that Rule 41(a)(2) is applicable to interpleader actions only if the affirmative claim for additional relief against the plaintiff could not possibly destroy the jurisdiction of the court over the entire action. As we have suggested above, this engrafting of an exception into Rule 41(a)(2) is unsound in principle and unwarranted in authority. Nevertheless, even if this interpretation of the Federal Rule were to be followed, its application by the Court of Appeals was erroneous. The record indicates that the plaintiff West-

inghouse never retracted its offer to pay an additional sum into the registry of the court representing the amount claimed in the affirmative counterclaims. But even if this offer had been rejected, as we have indicated, the district court would have retained jurisdiction over the action as a bill in the nature of interpleader grounded upon Section 301 of the Labor Management Relations Act.

The opinion of the Court of Appeals thus seriously undermines the liberal scope of the Federal Rules of Civil Procedure as applied to federal interpleader actions and should be reviewed by this Court.

III.

The plaintiff's motion to dismiss filed almost a year after the defendant IUE's motion to dismiss was denied by the district court, is grounded exclusively on a plea of *forum non conveniens*. The principles embodied in Section 1404 of the Federal Judiciary Code preclude the voluntary dismissal of an action by a plaintiff under Rule 41(a)(2) on a plea of *forum non conveniens*.

The district court in its opinion of July 11, 1951, granting the plaintiff's motion to dismiss, did so essentially on the ground that to proceed with the action would cause additional expense and inconvenience to Westinghouse. The rationale used by the court in granting the plaintiff's motion to dismiss was not based on lack of jurisdiction or improper venue.

The original decision of the district court had already held that the court had jurisdiction of the action and that venue was properly laid (R. 48-50). The facts upon which the court rendered the decision were based solely on the affidavit of Mr. Miller in support of plaintiff's motion to dismiss. In that affidavit the grounds for dismissal as set forth by Westinghouse were as follows (R. 138-139):

> "(a) That the issues raised by the defendants' answers will require the presence at the final hearing of

witnesses and records brought from the several plant locations aforesaid; and

"(b) That, whatever its outcome, further litigation of the question of jurisdiction aforesaid in this Court or the Appellate Courts, or both, will involve amounts of expense, delay and uncertainty which will offset the advantages of further proceedings here, to any of the parties."

The grounds as presented by the plaintiff and as ruled on by the court below were thus solely based upon a plea of *forum non conveniens.*

Under the Federal Rules of Civil Procedure, an action may not be discontinued or dismissed on the grounds of *forum non conveniens.* Since the enactment of Section 1404 of the Federal Judicial Code, a party is precluded in the federal courts from obtaining a dismissal of an action on the plea of inconvenient forum. Section 1404 provides:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

"(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

"(c) A district court may order any civil action to be tried at any place within the division in which it is pending. June 25, 1948, c. 646, 62 Stat. 937."

Section 1404 was drafted by Professor James N. Moore. In his Commentary on the U. S. Judicial Code 1949, Prof. Moore states:

"Unlike the former statutes, the Code deals in Section 1404 with forum non conveniens along modern and

sensible lines for judicial administration. *Whereas the principles of forum non conveniens resulted in the dismissal of an action, the doctrine now results in a transfer. The principles of Section 1404 apply to all civil actions, whether the venue is governed by Title 28 or is governed by some other Title of the United States Code."* * (Emphasis added.)

In his commentaries, Prof. Moore further states:

"Sub-section B provides for transfer of any action, suit or proceeding of a civil nature from one division to another division of the same district. This language is sufficiently broad to include an admiralty and any other proceeding of a non-criminal nature. * * * The only qualification of Section 1404 B is that the proceedings be of a civil nature. * * * This is a clear recognition that the doctrine of forum non conveniens is a facet of venue; and that it involves elements of convenience to all concerned. This is a procedural matter and hence State law is not controlling under Erie v. Tompkins. * * * *But 1404A does not authorize a dismissal for forum non conveniens; instead when this doctrine is invoked, the action is to be transferred to a proper and more convenient venue. Subsection A of 1404 goes beyond prior practice in that its principles apply to any civil action and it alters the prior practice of dismissal of an action because of forum non conveniens.*" (Emphasis added.)

The opinion of the Court of Appeals in this proceeding raises squarely for the first time before this Court the important issue in the administration of Federal Civil Procedure as to whether a plaintiff may avoid the principles laid down in Section 1404 by labelling a plea of *forum non*

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* That Prof. Moore's commentary on the impact of 1404 in federal civil procedure is of great, if not decisive weight is attested to by the language of this court in *U. S. v. National City Lines*, 337 U. S. 81:

"The reviser's notes are so obviously authoritative in perceiving the meaning of the Code that the government itself in discussing a section other than Section 1404A refers to them in its brief in the case."

conveniens as a motion for voluntary dismissal under Rule 41(a)(2).*

The policy reasons which militate against the *dismissal* of an action for reasons of an inconvenient forum in respect to a defendant, are equally persuasive in respect to a plaintiff. This is particularly evidenced by the record in this proceeding. Having strenuously resisted IUE's motion to dismiss or transfer on grounds of *forum non conveniens,* almost a year later plaintiff moves to dismiss on the same grounds. Having obtained injunctive relief against the defendants for over a year, restraining the institution of any independent claims for relief, the plaintiff should not now be permitted to evade the policy of Section 1404 by characterizing an inconvenient forum plea as a motion for voluntary dismissal under Rule 41(a)(2).

The sound policy considerations underlying the rule that actions will not now be dismissed in the federal courts on a plea of *forum non conveniens,* requires the review of the decision of the Court of Appeals.

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* Westinghouse's motion to dismiss its own action demonstrates the unusual spectacle of a plaintiff complaining that its own choice of forum is inconvenient. The rules of orderly procedure require that a plaintiff may not invoke the doctrine of *forum non conveniens* so as to obtain either dismissal or transfer of an action. This elementary concept has been restated recently in a federal court in a decision directly holding that a plea of inconvenient forum as embodied in Section 1404A is not available to a plaintiff.

In *Barnhart* v. *Rogers,* 85 F. Supp. 545 (N. D. Ohio W. D. 1949) the district court after making note of the fact that the party who chose the forum could not obtain relief under this doctrine prior to 1404, went on to state:

> "It appears to the Court that the motivating reason for the enactment of Section 1404A was to afford relief to a defendant by placing him on a footing of equality with a plaintiff in the selection of a forum for the trial of the case. If this be true, then it would be improper to hold in effect that the plaintiff's rights are enlarged thereby and that he may carry the defendant about the country to a forum that best suits his convenience and do so by virtue of the statute.
>
> "It appears to this Court that Section 1404A is not available to plaintiffs who voluntarily chose their own forum" (p. 599).

CONCLUSION

The petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment.

Respectfully submitted,

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MARSHALL PERLIN.

MAY 21 1952

Supreme Court of the United States

October Term 1951

No. 719

United Electrical, Radio and Machine Workers of America, a voluntary association; and Albert J. Fitzgerald, Julius Emspak and James J. Matles, as members thereof and as representatives of all of the members and locals thereof, et al.,

Petitioners,

against

Westinghouse Electric Corporation, a Pennsylvania Corporation

and

International Union of Electrical, Radio and Machine Workers (CIO), a voluntary association; and James B. Carey and Michael Fitzpatrick, as members thereof and as representatives of all of the members and locals thereof, et al.,

Respondents.

BRIEF FOR DEFENDANTS RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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No. 719

UNITED ELECTRICAL, RADIO AND MACHINE WORKKERS OF AMERICA, a voluntary association; and Albert J. Fitzgerald, Julius Emspak and James J. Matles, as members thereof and as representatives of all of the members and locals thereof, et al.,

Petitioners,

against

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (CIO), a voluntary association; and James B. Carey and Michael Fitzpatrick, as members thereof and as representatives of all of the members and locals thereof, et al.,

Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

International Union of Electrical, Radio and Machine Workers-CIO, herein called IUE-CIO, and its local unions, defendants-respondents in this proceeding, respectfully pray that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

QUESTION PRESENTED

Whether the District Court abused the discretion conferred by Federal Civil Procedure Rule 41(a)(2) in permitting voluntary discontinuance, before trial, of an action brought under the Federal Interpleader Act.

STATEMENT

The District Court of the United States for the Western District of Pennsylvania granted a motion of plaintiff-respondent, Westinghouse Electric Corporation, herein called Westinghouse, for leave to dismiss its interpleader action before trial, without prejudice and subject to the payment of costs (R. 151). The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court (R. 220).

Westinghouse, a Pennsylvania corporation, instituted the action under the Federal Interpleader Act, 28 U.S.C. Secs. 1335, 1397, 2361, to determine ownership of $270,403.25 in union dues that had been deducted, or checked off, from the wages of employees in fifteen plants located in seven states (R. 2). Named as claimants were defendants-respondents, International Union of Electrical, Radio and Machine Workers-CIO, and seventeen of its affiliated local unions; defendants-petitioners, United Electrical, Radio & Machine Workers of America, herein called UE, and twelve of its affiliated local unions; and a number of individual employees (R. 169). Each such

local and international labor organization is a voluntary unincorporated association (R. 3-9, 79, 81). With few exceptions, the organizations and individuals joined as defendants are nonresidents of the Commonwealth of Pennsylvania and were served with process outside the territorial limits of that state (R. 3-9, 58-59, 172-173).

The property in controversy derived from individual wage assignments executed by many thousands of local union members when UE was affiliated with the Congress of Industrial Organizations, herein called CIO (R. 12-13). The form of dues deduction authorization was fixed by collective bargaining agreement[1] and read, in pertinent part, as follows (R. 25; p. 10, Sec. VIII, par. 1):

> TO WESTINGHOUSE ELECTRIC CORPORATION
> Please deduct $..... from my pay each month and remit same to Local ....., United Electrical, Radio & Machine Workers of America, in accordance with this authorization and assignment, in payment of the monthly membership dues of such Local.

By the collective bargaining agreement, which became effective in 1947 and, as modified in 1948, extended until March 31, 1950, Westinghouse recognized a number of UE local unions as bargaining agents for separate units of employees in about 30 plants throughout the nation and obligated itself to withhold from wages and remit, on a monthly basis, "to the respective Locals of the Union" the dues of members of such local unions who had executed appropriate individual authorizations (R. 25; p. 9, Sec. VIII, par. 1, pp. 22-24; R. 133; pp. 3-4, 41-62).

Checkoff moneys were separately deducted, administered and paid out at each plant (R. 78-79, 89-104). Dues so deducted became the exclusive property of the local

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[1] The Labor Management Relations Act, 1947, requires individual authorization for deduction of union membership dues from wages. 29 U.S.C. Sec. 186(c)(4).

union. Thus, questions as to the correctness of the amounts deducted were to be settled between the employee and his local union (R. 25; p. 13, Sec. VIII, par. 4). In the event of transfer from a bargaining unit represented by one local union to a bargaining unit represented by a different local union, an employee's deduction authorization was rendered inoperative (R. 25; p. 13, Sec. VIII, par. 6). In addition, the national agreement provided that the local union and management should share equally the wages lost by local union representatives by reason of handling grievances (R. 133; p. 28, Sec. XV, par. 2). At each plant management reimbursed itself out of checkoff funds for advancing to local union representatives the local's share of payments under Section XV of the contract (R. 61-62). The practice under Section XV demonstrates the unlimited availability of each checkoff fund for use by a specific local union. Section XV is also important in another connection, discussed below.

In November 1949 CIO expelled UE from its ranks on the ground that the leadership of UE had fallen under the domination of the Communist Party (R. 85-86). CIO chartered IUE-CIO as its new affiliate for the electrical, radio and machine industry and called upon workers in the industry to throw off Communist control and adhere to CIO (R. 86). Within a short time, 17 local unions of Westinghouse workers, by overwhelming majority vote of their respective memberships, at separate meetings in the cities where they resided, disaffiliated from UE and affiliated with IUE-CIO (R. 86-104). These local unions were chartered by IUE-CIO and retained the same numbers and virtually the same members, officers and stewards as they had formerly possessed while in UE (R. 86-104).

In the case of the 17 local unions that had disaffiliated from UE to join IUE-CIO, Westinghouse continued to deduct dues from wages in accordance with outstanding individual assignments and the collective agreement but

refused to pay over the sums deducted on the ground that it was confronted by conflicting claims on behalf of rival labor organizations. In 12 of such instances, each checkoff fund was claimed by an IUE-CIO local union and a UE counterpart local. In five instances, there was no UE counterpart local; there each fund was claimed by an IUE-CIO local union and by the UE itself, which took the position that its local union had disbanded, thereby causing its property to revert to the parent organization under provisions of UE's constitution (R. 71, 89-104). Consequently, between November 1, 1949 and March 31, 1950, the termination date of the contract, 17 distinct checkoff funds accumulated (R. 181-193). However, for the duration of the contract, Westinghouse continued to deduct and remit dues in the 16 locations where no local union disaffiliation had occurred (R. 83).

With one exception, involving a small number of employees, the local unions that left UE to join IUE-CIO won a series of National Labor Relations Board elections held in April and May 1950 and were certified pursuant to the Labor Management Relations Act as exclusive bargaining representatives for employees at their respective plants (R. 88-104). As a result of such elections, the IUE-CIO local unions in this proceeding became, and currently are, exclusive bargaining agents for approximately 75 per cent of the employees previously covered by the contract that expired in March 1950 (R. 83, 87-104).

In April 1950, 5 IUE-CIO local unions instituted separate actions against Westinghouse in jurisdictions where they were resident, claiming the dues funds accumulated in their respective bargaining units on the theory that they were the same local unions as had been named in the dues deduction authorizations and the contract (R. 17-20). Such actions were either brought in, or removed to, federal courts (R. 17-20).

In May 1950 Westinghouse initiated this interpleader action. It deposited in the registry of the District Court $270,403.25, in which it disclaimed all interest, and asked the court to enjoin other actions, discharge it from liability and determine to what organizations or individuals the money should be paid (R. 21-24). The lower court granted a preliminary injunction restraining the defendant labor organizations from instituting or prosecuting any other action for the sum in controversy (R. 48-50).

UE and its local unions filed an answer consenting to entry of a judgment of interpleader (R. 57).

IUE-CIO and its local unions filed a motion to dismiss the complaint and for other relief advancing the following contentions (R. 58-60, 179-203):

1. The District Court lacked jurisdiction over the subject matter and over the persons of the nonresident defendants.

2. The venue was improper under 28 U.S.C. Sec. 1397 and the place of trial was so contrary to the interest of justice as to warrant dismissal for improper venue under 28 U.S.C. Sec. 1406(a).

3. If the action was not dismissed, in the interest of convenience it should be severed into separate causes relating to different funds and transferred to the districts of residence of the respective local unions claiming such funds, in accordance with 28 U.S.C. Sec. 1406(a) or 28 U.S.C. Sec. 1404(a).

At no time did IUE-CIO and its local unions ask for dismissal under Section 1404(a) of the Judiciary Code dealing with *forum non conveniens*. IUE-CIO's request for dismissal on account of improper venue was grounded on 28 U.S.C. Sec. 1406(a), providing that where the venue is improper a District Court may either dismiss or transfer. Under the *forum non conveniens* doctrine of 28

U.S.C. Sec. 1404(a), IUE-CIO and its local unions sought not dismissal but transfer.

The District Court did not rule on the merits of the issue of *forum non conveniens*. It determined the question of venue. Holding that the venue was proper under 28 U.S.C. Sec. 1397, the Court did not apply 28 U.S.C. Sec. 1406(a). As its opinion unmistakably demonstrates, the District Court postponed consideration of the question of *forum non conveniens* under 28 U.S.C. Sec. 1404(a) until after a hearing on the interpleader (R. 75).

The District Court overruled IUE-CIO's jurisdictional objections, without prejudice to renewal after hearing on the interpleader (R. 72). It ordered the defendant labor organizations to answer the complaint "in order to determine the plaintiff's right to interplead" (R. 76).

By the motion to dismiss, IUE-CIO and its local unions had questioned whether the total sum in dispute had been paid into court as required by the Interpleader Act. Westinghouse admitted that an additional sum of about $62,000 had been deducted from wages for union dues; it contended that it had not deposited the additional sum because it was entitled to a credit in that amount in reimbursement for the local unions' share of payments by the company to local union representatives for time spent in handling grievances, as provided in Section XV of the collective bargaining agreement (R. 61-62, 64).

Concerning IUE-CIO's contention, the District Court adopted the following position (R. 74-75):

> "As the complaint now stands, it presents a case of strict statutory interpleader. If there is an actual bona fide dispute to an additional $62,274.00, the action will take on the aspect of a bill in the nature of interpleader pro tanto.
>
> "Whether or not there is a bona fide dispute over that amount will have to be determined at the hear-

> ing on the interpleader. If it then appears that there is a bona fide dispute, the action should be dismissed unless plaintiff is then able to amend and pay the additional amount into court or post a bond to secure same."

In their answers, filed October 2 and 3, 1950, both sets of labor organizations alleged the amount in controversy to be greater than that acknowledged by Westinghouse to be due. UE and its local unions fixed the disputed sum at $333,607.25 (R. 108-129). IUE-CIO and its local unions alleged the correct amount to be $441,527.25, of which about $108,850.00 had been paid to UE local unions not defendants in this proceeding, while the remainder, $332,677.25, was owing to the IUE-CIO local unions herein because they were the same organizations as had been parties to the contract and as were named in the checkoff authorizations (R. 78-104). In addition, the answer of IUE-CIO and its local unions preserved the jurisdictional and other objections that had been raised by the motion to dismiss (R. 78, 104-107).

The answer of UE and its local unions asserted no counterclaim or separate prayer for relief in the amount of $62,274 (R. 108-129). Neither did the answer of IUE-CIO and its local unions (R. 78-107). Both answers computed the amounts due on a local union basis without crediting to Westinghouse any payments it claimed to have advanced to local union representatives (R. 78-107, 108-129).

As the answer of UE and its local unions admitted, there was a genuine controversy as to Westinghouse's right to withhold for itself the additional sum of $62,274.00. In a number of the plants where local unions disaffiliated from UE to join IUE-CIO, two sets of local union stewards came into existence during the period preceding termination of the contract. Westinghouse appears to have made advances to cover the local unions'

share of lost time payments under Section XV of the contract not only in the case of stewards functioning on behalf of IUE-CIO local unions but, in many places, in the case of stewards acting for UE counterpart locals (R. 64). The parties were unable to ascertain or agree upon to whom and in what amounts such advances were made (R. 136-137). Further, UE and IUE-CIO could reach no accord upon what credit, if any, Westinghouse was entitled to for payments to one or another of the rival union representatives. Petitioners' contention that there was an agreement among the parties as to which local union representatives should be paid for lost time (Pet., p. 9) is unsupported by the record and contrary to their own answer implying that the additional sum of $62,274 was in controversy (R. 108-129, 146).

Confronted by answers that substantially altered the nature of the action and after a pre-trial conference had failed to resolve the issues of fact and law arising out of the stand of all the defendants that an additional sum of at least $62,274 was in dispute, Westinghouse filed a motion for leave to discontinue without prejudice under Federal Civil Procedure Rule 41(a)(2) (R. 135-139). In support of the motion it was averred that proof of Westinghouse's right to a credit of $62,274 could only be had by producing records normally kept and witnesses normally stationed at distantly situated plants; that the defendants' answers would prevent discharge of the plaintiff corporation until after a final hearing on the merits and rendered it likely that the jurisdiction of the court would be subject to continued attack; and that the resulting expense, delay and uncertainty could be obviated or minimized by discontinuance of the present action and resort to courts in the vicinity of the plaintiff's plants (R. 136-139). Westinghouse thus declared its unwillingness to litigate in this proceeding the issue as to the $62,274 and, in fact, never paid the additional amount into court.

IUE-CIO and its local unions supported, and UE and its local unions opposed, the motion to discontinue. After considering the affidavits, briefs and arguments of the parties, the District Court entered its order dismissing the action, without prejudice, in accordance with the provisions of Federal Civil Procedure Rule 41(a)(2) (R. 146-152). The Court of Appeals affirmed (R. 220). By reason of successive stays, the District Court's restraint against prosecution of other suits has remained in effect and that Court still has custody of the sum of $270,403.25.

ARGUMENT

There is no valid reason why this Court should review the decision of the Court below. The grant of an application for discontinuance is a matter for the discretion of the trial court. Petitioners have shown no legal injury that would result from dismissal of the interpleader action. The Court below correctly held that the second sentence of Rule 41 (a)(2), relating to counterclaims, and 28 U.S.C. Section 1404 (a) had no application to the present case. Essentially, Petitioners maintain that they have a right to compel enlargement of an interpleader action on their own terms although the plaintiff is unwilling to increase the tendered stake. Neither the Interpleader Act nor Rule 41 (a)(2) gives them that right. The decision of the Court below conflicts with no other decisions. There is no significant issue of federal law involved.

I

The Decision Below Is Clearly Correct.

Westinghouse brought its motion to discontinue without prejudice under F.R.C.P. 41 (a)(2) and the District Court based its order of dismissal on the provisions of that rule. Rule 41 prescribes conditions for voluntary dis-

missal of actions. Rule 41 (a)(1) allows a plaintiff to obtain dismissal as a matter of right before service of an answer or motion for summary judgment. Rule 41 (a)(2) states that in all other cases the dismissal of an action at the plaintiff's instance shall depend upon order of the court.

Under Rule 41(a)(2) the grant of voluntary discontinuance rests within the sound discretion of the District Court. Dismissal will be permitted unless the defendant shows that it would cause him to suffer plain legal prejudice over and above the mere prospect of a second law suit. *Cone* v. *West Virginia Pulp and Paper Co.*, 330 U. S. 212, 217 (1947); *Jones* v. *SEC*, 298 U. S. 1, 19 (1936); *HOLC* v. *Huffman*, 134 F. 2d 314 (CA 8, 1943); *N.Y.C. & St. L. R. Co.* v. *Vardaman*, 181 F. 2d 769 (CA 8, 1950); *Ockert* v. *Union Barge Line Corp.*, 190 F. 2d 303 (CA 3, 1951). Thus Petitioners had the burden of establishing plain legal prejudice to the satisfaction of the District Court. The District Court found no such prejudice. In regard to the correctness of the District Court's judgment the Court of Appeals held (R. 218):

> "Both the decision reached and the manner of reaching it reveal an exercise of judicial discretion as proper as it was painstaking."

The record contains no trace of support for the suggestion that the Court below approved error so egregious as to warrant intervention by this Court. On the contrary, the facts disclose ample justification for approval by the Court below of the District Court's exercise of discretion.

Westinghouse had instituted an action of strict statutory interpleader. The answers of both sets of defendants converted the action into one in the nature of interpleader, since each group alleged the amount in contro to be different from that conceded by the plaintiff to be

due. 3 *Moore's Federal Practice* (2d ed. 1948) 3006. By placing in issue an additional sum of $62,274, such answers raised substantial questions of fact involving manifold small payments to numerous employees in widely distant places and created the prospect of considerable extra expense and inconvenience.

This prospect was enhanced by the circumstance that the plaintiff could not be discharged until the end of long and costly litigation on the merits, whereas if the action had remained a case of strict interpleader, the plaintiff would be discharged upon entry of an order of interpleader and before trial on the merits. 3 *Moore's Federal Practice,* supra, 3047-3048.

Moreover, the allegations concerning the $62,274 deficiency gave rise to serious jurisdictional problems for the plaintiff. It has been held that failure of a party seeking interpleader to furnish security equal to the full amount of money in controversy leaves the court without jurisdiction under the Interpleader Act to direct out-of-state service of process upon a nonresident defendant and to take other steps in the cause. *Edner* v. *Mass. Mut. Life Ins. Co.,* 138 F. 2d 327 (CA 3, 1949). On the other hand, should the plaintiff have deposited the additional sum in court, it would have encountered the claim that jurisdiction was placed in jeopardy because of lack of diversity of citizenship between the plaintiff, a Pennsylvania corporation, and other Pennsylvania claimants of the fund. See *Boice* v. *Boice,* 135 F. 2d 919 (CA 3, 1943); *Blackmer* v. *Mackay,* 65 F. Supp. 48 (SD NY 1946).

With sound reason Westinghouse believed that the foregoing inconveniences and difficulties could be either entirely eliminated or rendered susceptible of easy solution should it be permitted to resort to courts close to its plants. No harm would be accomplished by such a course inasmuch as both factually and legally the controversy concerning each of the local union dues funds is

separable. See *Local 1140 UE* v. *UE,* 45 N.W. 2d 408 (Sup Ct Minn, 1950); *Note* (1950), 63 Harv. L. Rev. 1413.

Accordingly, Westinghouse did not pay the additional sum of $62,274 into court but filed a motion declaring its unwillingness to litigate in the present proceeding its right to the credit.

Claiming to have been legally prejudiced by the dismissal, petitioners limited their attack on the judgment of the Court of Appeals to two counts: First, the Court below erroneously held that petitioners had not pleaded a counterclaim within the meaning of Rule 41 (a)(2). Second, the Court below should have held that the policy of 28 U.S.C. Sec. 1404 (a) prevented dismissal under Rule 41 (a)(2). Neither point is well taken. None of them merits review by this Court.

A. The Second Sentence of Rule 41(a)(2) Dealing With Counterclaims is Inapplicable.

The Court of Appeals correctly determined that, in the circumstances of this case, the second sentence of Rule 41 (a)(2) dealing with counterclaims was inapplicable. The interpleader statute was designed to protect the stakeholder rather than to enable a claimant to compel interpleader. *Sanders* v. *Armour Fertilizer Works,* 292 U. S. 190 (1934); *Met. Life Ins. Co.* v. *Segaritis,* 20 F. Supp. 739 (ED Pa, 1939). A claimant does not need the protection of the statute since he can bring his own suit. Here the stakeholder offered to permit the claimants to litigate the ownership of $270,403.25. Petitioners sought to enlarge the scope of the suit. By their answer they alleged that the stake that had been proffered was insufficient. Thus petitioners rejected interpleader on the terms offered. Neither the statute nor Rule 41 (a)(2) gave them a right to force interpleader on their own terms.

It should be recalled that the interpleader action was in its first, or preliminary, phase. *Turman Oil Co.* v. *Lathrop,* 8 F. Supp. 870, 873 (ND Okla, 1934). The trial court had not yet determined whether it had jurisdiction of the interpleader proceeding and had directed the filing of answers to enable it to decide if interpleader should be granted. Further, the court had declared that, if there was a genuine controversy over money not yet paid into court, the plaintiff would have the option of depositing such additional sum or having the action dismissed. Petitioners may not properly deny the allegations of their own answer implying that additional funds were in dispute. Accordingly, Westinghouse was free to exercise or refrain from exercising the option provided by the trial court. By filing its motion to discontinue Westinghouse refused the chance to litigate in this proceeding its claim to a set-off and chose the alternative of dismissal. This is standard practice under the Interpleader Act. Whenever a claimant pleads that more is due than the stakeholder has deposited in court, the stakeholder is given the opportunity either of increasing the deposit or discontinuing the suit. *John Hancock Mut. Life Ins. Co.* v. *Yarrow,* 95 F. Supp. 185 (ED Pa, 1951).

Under the Interpleader Act it is the stakeholder who has the power to determine the scope of the action. So basic is this premise that 28 U.S.C. Sec. 1335 (a)(2) makes it a jurisdictional requisite for the stakeholder to deposit in court the full sum of money in controversy or furnish bond for such amount. Unless this condition is satisfied the District Court lacks jurisdiction entirely. Jurisdiction is lost where the stakeholder commences an action of strict interpleader, a claimant converts the action into a suit in the nature of interpleader by alleging that the amount in controversy exceeds the amount of security furnished by the stakeholder, and the stakeholder fails to increase the stake. *Edner* v. *Mass. Mut.*

Life Ins. Co., supra; *3 Moore's Federal Practice*, supra, 3039. The fact that an adequate stake is a jurisdictional requirement provides the stakeholder encountering the allegation that more money is due with the option of increasing the amount already tendered or leaving the court without jurisdiction.

In the present action that option was exercised by Westinghouse. It is fatuous for petitioners to argue that Westinghouse made an offer to deposit the $62,274 which was never withdrawn. Nothing can be plainer than the fact that Westinghouse's motion to discontinue constituted a clear refusal to litigate the issue of the $62,274 in this action. Any offer previously made was unmistakably withdrawn. Further, the record plainly shows that Westinghouse never increased the original deposit.

Petitioners also contend that, even if the offer was retracted (as it was), the District Court could have retained jurisdiction over the action as a bill in the nature of interpleader grounded upon Section 301 of the Labor Management Relations Act. 29 U.S.C. 185. It is questionable whether Section 301 confers jurisdiction over the type of dispute here involved. *Sun Shipbuilding* v. *Shipbuilding Workers*, 95 F. Supp. 50 (ED Pa, 1950). Moreover, petitioners never advanced this argument before the District Court. In any event, however, the argument ignores the fact that the present action could only survive as an action of statutory interpleader. The majority of the labor organizations herein reside and were served with process outside the limits of the Commonwealth of Pennsylvania. IUE-CIO and its local unions never consented to the jurisdiction of the District Court. Except when a federal statute provides for service beyond such limits, F.R.C.P. 4 (f) confines effective service of process to the territorial limits of the state in which the District Court is held. Section 301 of the

Labor Management Relations Act does not expand the limits of effective service of process. *Daily Review Corp.* v. *International Typographical Union*, 9 F.R.D. 295 (ED NY, 1949). The Interpleader Act does. 28 U.S.C. Sec. 2361. Accordingly, Section 301 of the Labor Management Relations Act furnishes no adequate jurisdictional base. The present action must stand or fall as an action founded on the interpleader statute. In the absence of sufficient security, a statutory interpleader action must of necessity fall apart at the seams.

For the reasons stated, the clause of Rule 41 (a)(2) relating to counterclaims has no bearing on the instant case. The Interpleader Act sufficiently disposes of the matter.

In addition, petitioners' contention concerning an alleged counterclaim of $62,274 was advanced too late. petitioners did not articulate any such claim in their answer. They never informed the District Court of the presence of that claim. The affidavit submitted by petitioners in opposition to the motion to discontinue referred only to "affirmative defenses and prayers for relief" contained in their answer (R. 141). The answer did not plead an affirmative defense or prayer for relief in the amount of $62,274 (R. 108-129). Not until petitioners submitted their reply brief to the Court of Appeals did they discover an alleged counterclaim in the amount of $62,274. Manifestly, petitioners are not entitled to overthrow the judgment of the District Court on the basis of a plea that was not before it.

Obviously, petitioners sought to elevate the issue of the $62,274 to the status of a counterclaim solely in order to attack dismissal of the interpleader action after it had in fact been dismissed. In point of fact, petitioners are seeking to compel the District Court to determine the ownership of $62,274 that is not there. Before the Court of Appeals, counsel for petitioners admitted that they,

as claimants, could not require Westinghouse to deposit or furnish security for the additional $62,274. With that admission, petitioners yielded their case.

B. Section 1404 of the Federal Judiciary Code Does Not Preclude Dismissal of an Action Under Rule 41 (a) (2).

Preliminarily, it must be observed that neither in denying IUE-CIO's motion to dismiss nor in granting Westinghouse's motion to discontinue did the District Court rule on the issue of *forum non conveniens*. In the first instance the District Court reserved ruling on the question; in the second the Court proceeded on the basis of a wholly different concept, namely, the privilege of voluntary dismissal.

As a procedural device voluntary discontinuance is distinct from and independent of transfer on account of *forum non conveniens*.

In origin and content the two modes of procedure are entirely different. Rule 41 (a) is derived from the previously existing unqualified right of the plaintiff to control the disposition of his own action, absent prejudice to a vested interest of the defendant. *N. Y. C. & St. L. R. Co.* v. *Vardaman*, supra; *Ex parte Skinner & Eddy Corp.*, 319 U.S. 730 (1924). Section 1404 of the Judiciary Code is a restatement of the doctrine of *forum non conveniens*. *Ex parte Collett*, 337 U.S. 55 (1949); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1946). Section 1404 contains no limitation whatsoever on the privilege of discontinuance embodied in Rule 41 (a). The language of Section 1404 permits transfer. It does not ban voluntary discontinuance for any reason. There is nothing in the legislative history of Section 1404 even remotely suggesting that the provision was intended to curb or modify the privilege of withdrawal described in Rule 41 (a). See *Ex parte Collett*, supra.

In operation the two procedures under discussion are equally distinguishable. Rule 41 (a)(1) recognizes the absolute right of the plaintiff to withdraw. Dismissal in accordance with Rule 41 (a)(2), while subject to the discretion of the court, will be permitted unless the defendant shows that it will cause him legal injury. *HOLC* v. *Huffman*, supra. In contrast, under Section 1404 (a), it is the moving party who bears the burden of establishing the necessity for transfer. *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (CA2, 1950).

Since each form of relief constitutes an independent and concurrently available alternative, there is no reason why a court may not consider any and all factors of convenience in connection with a plaintiff's application for a nonsuit. In actuality, it would stultify the full discretion that a court is obliged to exercise under Rule 41 (a)(2) to compel the trial judge to ignore the entire range of prospective inconvenience and injustice that might render desirable discontinuance of a proceeding, especially when the action was initiated with quite contrary expectations. The fact that circumstances of expense and inconvenience may be relevant to the issue of *forum non conveniens* does not render them irrelevant to the appropriateness of voluntary discontinuance.

Indeed, as already noted, the burden of resisting the plaintiff's motion for voluntary discontinuance rests upon the defendant. This burden can only be discharged by demonstrating the likelihood of legal injury. Consequently, it has been pointed out that ordinarily the plaintiff's reasons for desiring dismissal are immaterial. See *Ex parte Skinner & Eddy Corp.*, supra. The result would be strange and wholly unjustifiable if the defendant should be relieved of his burden of establishing legal injury and the plaintiff were to lose his privilege of discontinuance merely because the plaintiff urged relevant

considerations of economy and convenience in support of his application for nonsuit.

Petitioners cited no cases or authority dealing with limitation of the privilege of voluntary dismissal by Section 1404 of the Judicial Code. On the other hand, recent decisions effectively refute petitioners' extravagant theory. *N. Y. C. & St. L. R. Co.* v. *Vardaman,* supra; *Bolten* v. *General Motors Corp.,* 180 F. 2d 379 (CA7, 1950), cert. den. 340 U.S. 813 (1950)

That Section 1404 in no way curbs the remedy under Rule 41 is demonstrated by the *Vardaman* case, cited above. There the Court of Appeals for the Eighth Circuit, with full knowledge that the plaintiff's request for dismissal was actuated solely by the motive of obtaining a more favorable forum for the determination of his claim, nevertheless upheld dismissal as proper under Rule 41 (a)(2). Rejecting the defendant's plea that it was legally prejudiced by loss of the benefit provided by Section 1404 (a), the Court declared (181 F. 2d 769, 771):

> "Section 1404 (a) provides a purely procedural method relating to place of forum, which is not mandatory but depends upon the exercise of sound judicial discretion. Denial of such manner of choice of forum is not a prejudicially arbitrary act because 'no one has a vested right in any given mode of procedure,' *Ex parte Collett,* 337 U.S. 55, 71. . . ."

In effect, petitioners are maintaining that dismissal was improper because Section 1404 (a) conferred upon them a vested right regarding the place of trial of the interpleader action. Quite properly, the answer below was the same as in *Vardaman*: No one has a vested right in a given mode of procedure.

The patent lack of merit in petitioners' effort to convert Section 1404 into a means of impeding the operation of Rule 41 is exposed by a recent, thoroughgoing study

of Section 1404 (a), in which the following statements appear (*Note* (1951), 51 Col. L. Rev. 762, 764):

> "Nor does the provision for transfer affect a plaintiff's right to dismissal without prejudice . . . Since both transfer and dismissal on plaintiff's motion are discretionary, it seems that a court might either dismiss or transfer within the limits of discretion of the two rules."

It must be concluded that the Court of Appeals did not err in finding that the trial court's exercise of discretion under Rule 41 was unrestricted by Section 1404.

II

There Is No Conflict of Decisions.

Petitioners implied that the decision of the Court of Appeals in this case conflicted with applicable decisions of this Court and other Courts of Appeal. This is not the case.

Petitioners cited no decision holding that where, as in the present case, a claimant filed an answer rejecting strict statutory interpleader and converting the action into a suit in the nature of interpleader, and the stakeholder refused to proceed or increase the stake, voluntary dismissal was precluded by the second sentence of Rule 41 (a)(2) relating to counterclaims.

The cases on which petitioners rely are obviously not in point. *Coastal Air Lines* v. *Dockery,* 180 F. 2d 874 (CA8, 1950) dealt not with a counterclaim but a cross-claim by one claimant against another. The stakeholder raised no objection; the claimant against whom the cross-claim was lodged interposed no timely jurisdictional plea.

Texas v. *Florida,* 306 U.S. 398 (1939) and *Sherman National Bank* v. *Schubert Theatrical Co.,* 238 Fed. 225 (SD NY, 1916) were concerned with bills in the nature

of interpleader where the stakeholders were willing to proceed. Neither case involved the question whether the claimants could prevent withdrawal of the interpleader action despite the stakeholder's unwillingness to place adequate security in the custody of the court. Both suits did not rest on the Interpleader Act. None of the other cases cited by petitioners related to interpleader.

Insofar as petitioners' *forum non conveniens* argument is concerned, it has already been observed that petitioners cited no cases in support thereof. The decided cases clearly uphold the position of the Court of Appeals.

It is submitted that no conflict of decisions has been demonstrated or exists.

III

There Is No Important Question of Federal Law.

The only issue raised by the petition is whether the Court below erred in holding that a claimant may not compel a stakeholder to enlarge a statutory interpleader action in the absence of security for the additional amount alleged to be in controversy. From the statute and the decisions thereunder it is easily inferred that a claimant has no such right. The question involved is narrow. Upon careful consideration, the trial court found that no injury to petitioners' legal rights would result from discontinuance of the interpleader action. As the Court of Appeals held, the trial court acted well within the limits of its discretion. No sound reason exists for magnifying a pinpoint of interpleader procedure to the size of an important question of federal law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1951

NO. 719.

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, a voluntary association, and ALBERT J. FITZGERALD, JULIUS EMSPAK and JAMES J. MATLES, as members thereof and as representatives of all of the members and locals thereof, et al., Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (CIO), a voluntary association; and JAMES E. CAREY and MICHAEL FITZPATRICK, as members thereof and as representatives of all of the members and locals thereof, et al., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN BEHALF OF WESTINGHOUSE ELECTRIC CORPORATION, PLAINTIFF-RESPONDENT, OPPOSING THE PETITION FOR CERTIORARI

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OFFICIAL REPORTS OF THE PROCEEDINGS IN THE COURTS BELOW.

The Opinion of the Court of Appeals (R. 216) is reported in 194 Fed. (2d) 770 (1952). The Opinion of the District Court, granting plaintiff's motion to dismiss the Complaint (R. 146), is reported as *Westinghouse Electric Corporation v. United Electrical Radio & Machine Workers of America et al.*, 99 Fed. Supp. 597 (1951).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 21, 1952. The Petition for Certiorari was filed on April 21, 1952. This Court has jurisdiction to grant or deny the writ of certiorari under Title 28 United States Code, Section 1254.

STATUTE AND RULE INVOLVED.

This case involves the interpretation of the federal interpleader Statute, Section 1335 of the Judicial Code of 1948 (28 U.S.C. 1335), printed at page 1c, *infra;* and the interpretation of Rule 41 (a) (2) of the Federal Rules of Civil Procedure, printed at page 2c, *infra.*

COUNTER-STATEMENT OF THE CASE.

This is an interpleader action, filed in the District Court of the United States for the Western District of Pennsylvania by the plaintiff-respondent Westinghouse Electric Corporation, under the provisions of Section 1335 of the Judicial Code of 1948 (28 U.S.C. 1335). After answers had been filed by certain of the defendant claimants of the fund in controversy, but before the entry of a decree of interpleader, the plaintiff stakeholder sought leave of court to dismiss the action, without prejudice. Over the opposition of one claimant, the District Court granted leave to dismiss. On appeal, the Court of Appeals affirmed. The present petition asks this Court to review the propriety of the dismissal.

Westinghouse Electric Corporation, the plaintiff in the interpleader action, is a Pennsylvania corporation. The principal defendants were two unincorporated national labor unions, the appellant United Electrical, Radio and Machine Workers of America, which has filed the Petition for Certiorari now before this Court, and the International Union of Electrical, Radio and Machine Workers (CIO)—which apparently will join the plaintiff in opposing the grant of certiorari, and numerous Locals of each of these national unions, formed of individuals employed by the plaintiff Company at plants located in Pennsylvania and many other States. In addition, the Complaint named as defendants a number of individuals who had asserted claims against the fund in controversy, adverse to those of the two national unions and their Locals. (See Complaint, R. 2a-24a).

The property at stake in the interpleader action is money, a fund of $270,403.25 which had been deducted or "checked-off" by the plaintiff, as labor union membership dues, from the wages of several thousand individual employees, earned at times between November 1, 1949 and March 31, 1950, for work and labor in the plaintiff's manufacturing plants in Pennsylvania and other States.

In its Complaint, the plaintiff acknowledged that it had no claim to any part of this fund (R. 21a). Answers filed by the two national unions and their Locals made it clear that the entire fund was and is claimed for its Locals and itself by the United Electrical, Radio and Machine Workers of America and that wholly adverse claims to the entire fund are made in behalf of the several Locals of the International Union of Electrical, Radio and Machine Workers (CIO). In other words, and beyond any dispute, this is a case in which, at the time the action was brought, plaintiff had in its hands a fund of money to which it had no claim, but which was subject to the conflicting claims of numerous others.

As a matter of convenience, and to avoid possible confusion, this brief will refer to the Westinghouse Electric Corporation, plaintiff in the District Court, as the "plaintiff," and will call the two national unions by their common names, referring to the United Electrical, Radio and Machine Workers of America, a defendant in the District Court and petitioner here, as the "UE," and to the International Union of Electrical, Radio and Machine Workers (CIO), also a defendant in the District Court, and a respondent here, as the "IUE (CIO)."

From some time before April 1, 1947 until March 31, 1950, the UE was the lawfully certified and qualified representative, for the purposes of collective bargaining, of substantially all of the many thousands of laborers employed in the plaintiff's manufacturing plants which are involved in this case. On April 1, 1947, the UE national organization, acting for itself and for its Locals established at the plaintiff's plants, entered into a written agreement with the plaintiff. A copy of the Agreement is attached to the Record at R. 133a. In addition to provisions fixing the wages of the employees, and governing many other conditions of their work, this contract contained two provisions, both relating to financial arrangements between the union and the plaintiff and both important here, *viz.*:

1. A "check-off" provision, appearing as Section VIII on pages 7-11 of the printed Agreement, under which the plaintiff agreed to "check-off" or withhold from the first wage payment due each union member in every calendar month, an amount sufficient to pay the member's dues and initiation fees, and to remit the aggregate of the funds so withheld "to the respective Locals of the Union"; and

2. A provision appearing under the heading "Union Representatives," on page 28 of the Agreement, under which it was agreed that certain representatives of the Locals should be permitted to leave their work to attend to certain union affairs, under certain common circumstances, and that the Local and the Company should share equally the wages paid such individuals for time so spent apart from their work for the Company.

In the union's Constitution and By-Laws were and are included a provision (R. 71a; p. 21, Article 15) under which the national organization was apparently entitled to receive the sum of fifty cents per month out of the dues payable by each member of an active Local; and also to a share of one dollar out of each initiation fee; and a provision (R. 71a; p. 27, Sec. N) under which, it has been asserted, the property of any Local which disbands or goes out of existence, passes to the national organization.

From April 1, 1947, until about November 1, 1949, the plaintiff and the UE proceeded in a normal and generally uneventful way to carry out the financial arrangements made by the contract just considered, and continued without presently material change by various supplements to that contract. Under the terms of the latest of the supplements, the 1947 contract in general and the "check-off" clauses in particular were to be continued in effect until March 31, 1950: see page 21 of the Supplement printed at R. 25a. However, in the meantime, during September and October, 1949, there occurred an internal schism in the national union, and among its Locals, which ultimately gave rise to the case presented here.

As is to be expected, accounts of the causes and nature of the schism differ; but all parties agree concerning certain of its circumstances. Members of certain of the UE Locals, having differed with the national officers upon political and perhaps other grounds, laid their differences or grievances before a national convention of the C.I.O. In the controversy which followed, the

national convention supported the dissenting members and Locals, disaffiliated the UE's national office and national organization from any further connection with the C.I.O., and "chartered" or authorized the formation of a new national union, the IUE (CIO). (See R. 13a, etc.)

Immediately after this creation of the IUE (CIO), its leaders and members set up a national office in Washington, D. C.; adopted a provisional Constitution and By-laws; elected or appointed a staff of national officers; assumed jurisdiction over those lately UE Locals or Local organizations which chose to affiliate with it; and established new IUE (CIO) Locals as rival organizations in plants where the UE national organization had continued to maintain its control of preexisting Local organizations (R. 13a-14a).

During the same period, the UE's national office, which had retained the support of substantial numbers of members in many plants, and of majorities of its original Locals in some, continued its activities and functions as far as the circumstances permitted, and formed or attempted to form a new UE Local at every place in which the preexisting Local organization had affiliated or attempted to affiliate with the new IUE (CIO) (R. 14a-15a).

As a result of this contest for representative status between the two national organizations, there were, during the winter of 1949-1950 and at the time this suit was commenced (May 25, 1950), two Locals—a UE Local and an IUE (CIO) Local—at each of the plants involved here, except four. The four exceptions were the plants at Bloomfield, N. J.; Lima and Mansfield,

Ohio, and Philadelphia, Pa.: at these four plants the UE Locals had been disbanded at times before May 25, 1950.

At the beginning of the controversy, during the early days of November, 1949, the plaintiff received numerous notices from both the national and various Local officers of the two factions, respecting the "checking-off" and remittance of membership dues, under the contract of 1947. All parties agreed on one point: that the Company should continue to withhold dues under the contract. However, the UE's national officers, and those of the UE Locals insisted in their notices that the entire amount "checked-off" should be remitted to the UE Locals at the several plants and shops, or, where they had ceased to function, to the UE's national office; while the IUE (CIO) national officers, and its Locals, gave notices that these latter Locals were the only lawful payees of the money to be "checked-off," under the contract and under the law (R. 15a-16a).

It was, of course, impossible to comply with both of these groups of wholly conflicting claims to the same fund, but it was, as it appeared to the plaintiff (and as it seemed to appear to all of the claimants), necessary to continue performance of the promise to "check-off" or withhold the amounts called for by the contract of April 1, 1947, and its supplements. Accordingly, from November 1, 1949 until March 31, 1950, when the 1947 contract expired, the plaintiff continued, from month to month, to deduct the proper amount[1] from the wages

1. The amount deducted per union member varied from plant to plant, as it had been fixed, within limits, by the Local organizations.

due each union member. But, instead of remitting the amounts so collected to either the UE Locals or the IUE (CIO) Locals, or to the UE national organization, it retained them to await either an amicable or a judicial determination of the conflicting claims. By March 31, 1950, the plaintiff had, by this process, accumulated in its hands the sum of $270,403.25.[2]

In the meantime, there was much controversy over the question of the right to act as representative of the employees, between the two union organizations. In general, at each of the plaintiff's plants, this right was claimed both by the UE Local and by the IUE (CIO) Local. During April and May of 1950, after the 1947 contract had expired, the National Labor Relations Board held a series of elections in the plants and shops, on a plant-by-plant basis. In these elections, the eligible employees at some plants chose the UE as their exclusive representative; in others, the IUE (CIO) was chosen; and in each case the Board issued a proper certificate. This resolved the conflict of legal claims to representative status for the future; but it did not resolve the conflicting claims to the money in the plaintiff's hands, and it was not followed by any agreement between the claimants which settled that question.

Instead, during April, 1950, five Locals of the IUE (CIO) — those claiming to represent employees at the

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2. As will appear later, the total amount "checked-off" from wages was substantially larger. The $270,403.25, ultimately paid into court, was the net sum remaining after payment to the Company, from the total "checked-off" from employees' wages, of the union's half share of wages paid union representatives for time spent in union activities: see page 5, *supra*.

plaintiff's plants at Bloomfield and Belleville, New Jersey; at Fairmont, West Virginia; at Mansfield, Ohio; at Cleveland, Ohio; and at Lima, Ohio — brought several suits in the local State and federal courts, the complaint in each case claiming all dues accumulated by the plaintiff at the plant concerned. The IUE (CIO) Locals at other plants threatened to follow the same course. In opposition, the UE national organization renewed its demands that the entire sum in the plaintiff's hands be paid to it. It had not become a party to any of the five actions and — since its offices and officers were apparently subject to service only in New York, it probably could not be made subject to the judgments of the local courts in the five cases.

All these circumstances appeared to present a situation in which the plaintiff had no interest, save that of a stakeholder in the fund in its hands; and one in which, since every dollar of the fund was claimed by citizens of more than one State, the best if not the only remedy against the risk of double or multiple liability lay in an interpleader action under Section 1335 of the Judicial Code. In a proceeding under that Statute, process issued by a District Court in one State may be served upon claimants resident in other States.

At the outset, having determined to exercise the remedy provided by Section 1335, the plaintiff appeared to have the right to choose between the commencement of a single action, and the settlement in one District Court of all claims to the $270,403.25 admittedly belonging to some one or more of the claimants, and, in the alternative, the commencement of a number of separate actions, under the same Statute if necessary, on a plant-

by-plant, a State-by-State, or some other generally similar basis, each action involving only a part of the whole fund.

For obvious reasons, the choice of the former course promised immediate economies of time and expense to the plaintiff, and appeared, on the whole, to threaten no offsetting inconvenience to the other parties. Accordingly, on May 26, 1950, the plaintiff filed the Complaint in this case, and thereby offered to pay the entire fund of $270,403.25 into the court below, and to submit to the adjudication of that one court all of the various conflicting claims to the fund.

On May 26, 1950, upon the filing of the Complaint, the District Court made an Order granting the plaintiff leave to pay the $270,403.25 into court, commanding that the plaintiffs in the five actions already brought withhold further proceedings therein, and forbidding the entry or prosecution of any other proceedings to recover the fund in controversy, except in this interpleader action (R. 48a-50a).

By virtue of later orders of the District Court and of supersedeas Orders entered in the Court of Appeals on July 25, 1951 (R. 162a) and on April 10, 1952 (p. 3c, *infra*), this Order of May 26, 1950 has remained in effect ever since. As results, proceedings in the five earlier actions have been stayed, and (with here immaterial exceptions) the controversy over the "checked-off" dues has been confined to this case.

Early in the case, a Motion to Dismiss the Complaint, and for other relief, was presented by the de-

fendant IUE (CIO) and its Locals (R. 58a, etc.). This pleading raised two principal contentions: the contention of law that, under Section 1335 of the Judicial Code, the District Court lacked jurisdiction of the subject matter of this case; and, secondly, the contention of fact that the litigation of all of their claims in the court below—a court remote from the locations of some of the plants concerned, would impose excessive and unnecessary burdens of expense and inconvenience upon some or all of the IUE (CIO) Locals. The motion prayed that the action be dismissed on the jurisdictional ground; or, in the alternative, that the court order transfers of proper parts of the fund in controversy to the courts of the Districts in which the several plants and Locals were situate, for litigation of the conflicting claims in those courts.

The Motion to Dismiss was actively opposed by the plaintiff and by the defendants the UE and its Locals, in affidavits on the question of venue or inconvenient forum (R. 61a and 66a), and by argument upon both this question and the question of jurisdiction. After hearing the matter fully, the District Court (MARSH, D. J.) handed down an Opinion[3] (R. 72a) and made an Order, entered on August 11, 1950 (R. 76a), which denied the motion, and required the defendants to answer the Complaint.

On or about October 1, 1950, two long answers were filed: one in behalf of the IUE (CIO) and its Locals (R. 78a-107a) and the other in behalf of the UE and its Locals (R. 108a-129a). Neither Answer denied any

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3. *Westinghouse Electric Corp. v. U.E.R.M.W.A. et al.*, 92 F. Supp. 841 (W. D. Pa., 1950).

important averment of the plaintiff's Complaint, but both Answers were, nevertheless, calculated to introduce new—and by the plaintiff unforeseen—issues into the case.

The Answer filed by the IUE (CIO) and its Locals questioned the plaintiff's right to repay itself, out of the "checked-off" dues, any sum on account of the union's one-half share of wages paid union representatives for time spent on union business, and averred that plaintiff should be required, on that account, to add the sum of $62,274 to the fund already paid into court.[4] It asserted that the fund should be further increased by the payment into court of an additional $108,850, assertedly "checked-off" the wages of employees at sixteen of plaintiff's plants not theretofore involved in the case or mentioned in the pleadings (R. 78a; 83a-84a). It asserted, finally, claims to the entire fund so restated and increased in amount from $270,403.25 to $441,527.25 (R. 83a), on a Local-by-Local basis (R. 89a-104a). The IUE (CIO) national organization, it appeared, made no direct claim to any of the accumulated dues, on its own account.

The Answer filed by the UE and its Locals (R. 108a-129a) resembled the IUE (CIO) Answer to the extent that it denied the plaintiff's right to any credit for the half share of wages paid to union representatives. Like the IUE (CIO) Answer, it stated claims of the UE Locals, on a Local-by-Local basis, to various parts

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4. The figure stated by the Answer of the IUE (CIO)—$62,274—appeared in an accounting tabulation filed by the plaintiff at the beginning of the case, and reproduced at R. 64a.

of the fund in controversy. Unlike the IUE (CIO) Answer, it asserted that the UE national organization was entitled to a share of at least $94,745.50 of the $270,403.25 paid into court, and also—at least contingently—to additional parts of the fund in controversy. It contended that the fund should be increased from $270,403.25 to at least $327,453.25 (R. 127a).

Of the several new issues raised by these Answers, one—an issue raised in both—threatened, as the case proceeded, to add enormously to the plaintiff's burdens at the trial of the case. This was the issue raised by the refusal of either faction of the defendants to concede the plaintiff's right to repayment of a single dollar of the moneys it had paid to a multitude of union representatives, scattered throughout all of the plants involved in the case, as wages for working hours actually spent in union activities.

The applicable provision of the contract was plain: it was paragraph 2 of Section XV of the 1947 contract, appearing on page 28 of the document inserted at R. 133a; a provision always construed to entitle plaintiff to set off its claims against the Locals for wages paid union representatives against its remittances of "checked-off" dues. But, after some effort at an amicable agreement on the issue and a considerable study of the accounting records, it appeared to the plaintiff that proof of its right to set off any particular amount, as one-half of the money paid to the union representatives between November 1, 1949 and March 31, 1950, might well involve the production, at the trial of the case, of voluminous accounting records and numerous witnesses, to be assembled and brought to the court room

from all of the fifteen widely scattered plants which were involved in the case. This somewhat discouraging prospect was made even less attractive by the renewal, in the Answer filed by the IUE (CIO), of its previous contentions that the District Court lacked jurisdiction of the case, and that the venue chosen was wholly improper (R. 136a-139a).

On April 26, 1951, the plaintiff presented in the District Court a motion for leave to dismiss the present case, without prejudice (R. 135a). In support of the motion, it filed the affidavit of its Vice President, William E. Miller, Esq. This affidavit outlined as reasons for plaintiff's desire to dismiss the case the considerations just described, and disclosed the plaintiff's belief that litigation over those parts of the fund in controversy which had been collected at plants in States other than Pennsylvania, might better be prosecuted in courts located in those States (R. 138a, etc.).

At argument, the motion for leave to dismiss was supported by the IUE (CIO)—which had long before expressed its preference for litigation of the matter on a State-by-State basis. It was vigorously opposed by the UE for reasons set forth in an affidavit of its general counsel, Mr. Scribner (R. 140a), and renewed here.

On July 11, 1951, his honor Judge MARSH, who had heard the case in the District Court, handed down an Opinion, and entered an Order which sustained the motion to dismiss, without prejudice, and which ordered the Clerk of the court to return to the plaintiff its deposit of $270,403.25.

Six days later, on July 17, 1951, the UE entered an appeal from the Order so entered to the Court of Appeals

for the Third Circuit (R. 166a). On July 25th, an Order, mentioned above, was entered in the Court of Appeals by which the order under appeal was stayed pending the decision of the case (R. 162a).

On January 8, 1952, the case was argued in the Court of Appeals. Counsel for the UE, the appellant, presented arguments to the effect that the order of discontinuance had been improperly entered and should be reversed. Plaintiff opposed a reversal, and urged that the Order be affirmed. The IUE (CIO), taking the same stand it had taken in the District Court, endorsed and supported plaintiff's contentions that the discontinuance had been properly allowed, and that the judgment should be affirmed.

On February 21, 1952, the Court of Appeals handed down an Opinion (by HASTIE, J.), by which it held that the judgment of dismissal without prejudice should be affirmed (R. 216), and on the same day it entered accordingly the judgment now sought to be reviewed.

On April 10, 1952, the Court of Appeals entered an Order (printed at page 3c, etc., *infra* of this present brief) by which it has suspended any payment or distribution of the $270,403.25 in the registry of the District Court, pending the outcome of this certiorari proceeding in this Court. As a result, the *status quo* has been preserved to the date that this brief is written.

SUMMARY OF ARGUMENT.

I. The UE cannot show that the discontinuance of this action, without prejudice, resulted in any actual injury to its interests. As a result, its case here must depend wholly upon a literal and legalistic interpretation of the provision of Rule 41 (a) (2) of the Federal Rules of Civil Procedure, that an action in which a counterclaim is filed cannot thereafter be dismissed at plaintiff's instance, and over the counterclaimant's objection.

II. This case does not fall within the relevant provision of Rule 41 (a) (2):

1. An action of interpleader involves two separate proceedings:

(a) A proceeding in which the plaintiff stakeholder seeks a decree which will discharge him from liability to either claimant, upon his payment of the stake or *res* into court; and

(b) A proceeding which begins after a decree of interpleader has been entered, in which the plaintiff stakeholder has no part or interest, and in which the several claimants are required to assert and litigate against each other their claims to the stake or *res,* and to be concluded by the court's adjudication.

2. In the first of the two stages of an interpleader action, that in which the only question is "Shall a decree of interpleader be entered or not?", neither claimant can freeze the court's jurisdiction simply by asserting a so-called counterclaim to money or property not disclaimed or tendered by the plaintiff. The reasons for this are illustrated in the present case. Had the plaintiff here not moved to

dismiss this case, the so-called "counterclaim" asserted by the answer of the UE could, had it been sustained by the court, have resulted at most in a decree denying interpleader and dismissing the action. It could not have resulted in a judgment for the amount claimed, either against the plaintiff or against some other defendant, for in the first stage of an interpleader proceeding such questions are not presented and therefore such an adjudication cannot be reached. In this situation, the UE cannot complain because its so-called "counterclaim" has been conceded the full effect which could have resulted from its successful litigation. As a result, the decision of the matter by the courts below was proper, and cannot be held to have violated Rule 41 (a) (2).

ARGUMENT.

I. The Discontinuance of This Action Could Not and Did Not Do Any Actual Injury to the UE. The UE Must Therefore Rely Not Upon Any Actual Injury, But Upon an Alleged Violation of Rule 41 (a) (2).

In the proceedings upon the plaintiff's motion to dismiss the case, in both the District Court and the Court of Appeals, the UE did all that could be done to suggest that a dismissal without prejudice would do some harm to its interests. This effort was very much to the point, for under the law a plaintiff cannot, after answer filed, dismiss or discontinue his action, if the discontinuance will result in some plain legal prejudice to a defendant:

> *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U.S. 138, 146 (1897);
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> *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947);
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> *Jones v. Securities Exchange Commission*, 298 U.S. 1, 19 (1936);
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> *City of Detroit v. Detroit City Ry. Co.*, 55 Fed. 569, 573 (D. Mich. 1893).

However, the effort of the UE to show the requisite kind of prejudice failed utterly. As their opinions show, the two courts below considered carefully every ground which was advanced, including the suggestion that the filing of the so-called counterclaim had given the UE a vested equity to insist that the case proceed. Both courts concluded that the discontinuance sought by the plaintiff could do the UE no injury against which a court of justice should be inclined to protect it.

It would burden this brief needlessly to discuss the details of this aspect of the matter, inasmuch as they are sufficiently outlined in the Opinion of the District Court (R. 150a) and that of the Court of Appeals (R. 218), and also because this ground of opposition is not, it seems, seriously pressed here. Instead, in its present petition for certiorari, the UE appears to rely wholly upon the contention that the decision of the courts below has violated Rule 41 (a) (2), and that this alone calls for a review and a reversal, even though nobody may have been hurt by the supposed violation.

II. The Decision Under Review Resulted in No Violation of Rule 41 (a) (2).

1. *In the first of the two parts of such a strict interpleader proceeding as this, the only question is: Shall interpleader be granted and the plaintiff discharged?*

An action of interpleader is peculiar, among other things, because it normally divides itself into two wholly separate controversies, each of which is the subject of independent litigation and independent decision.

In the first of the two stages, the plaintiff and all defendants are parties. The plaintiff, having disclaimed or offered to disclaim, and having paid or offered to pay into court, the money or property which is the subject of the case, seeks a decree of interpleader: a decree which discharges him of further liability, and requires the defendants to prove their conflicting claims to the money or property only in a subsequent proceeding amongst themselves, and to submit to the court's adjudication of that matter.

If the defendants admit that the money paid or tendered, the stake, is the true subject of conflicting claims between them, and have no other valid objection, a decree of interpleader is entered by consent. If any defendant questions by answer and proof the validity or amount of the payment or tender of payment into court, or the jurisdiction of the court, or the existence of the conflicting claims alleged by the plaintiff, then the court must hear and decide the issues of fact or law so raised. If it decides the issues against the plaintiff, it dismisses the complaint, and refuses to enter a decree of interpleader. If, instead, it decides the issues in the plaintiff's favor, it discharges the plaintiff and enters a decree of interpleader.

If a decree of interpleader is entered, by concession of the defendants or by decision of the court, the first stage of the proceeding is at an end, and the second stage begins. In the second stage of a strict interpleader, the plaintiff drops out of the case, and the court proceeds to decide how the money or property in its hands shall be distributed amongst the defendant claimants.

But in the first stage of an interpleader proceeding, the sole permissible question is: Shall or shall not the court enter a decree discharging the plaintiff from any liability, and requiring the defendants to settle their controversy in a single, supplementary proceeding in the same court?

In *Turman Oil Co. v. Lathrop,* 8 Fed. Supp. 870 (D. Okla. 1934), it was observed that this practice, just described, is old and well-established (p. 873):

> "An interpleading suit was a remedy well established under the English system of jurisprudence.

Hoggart v. Cutts, Craig & P. 198, 204; Wakeman v. Kingsland, 46 N. J. Eq. (1 Dick.) 113, 18 A. 681; Atoka Coal & Mining Co. v. Hodges (C.C.A.) 59 F. 836, 841.

"Such an action involves two successive litigations; one between the plaintiff and the defendants as to whether the defendants shall interplead; the other between the different defendants on the conflicting claims. Roselle v. Farmers' Bank, 119 Mo. 84, 24 S.W. 744; Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; McDonald v. Allen, 37 Wis. 108, 19 Am. Rep. 754; Atkinson v. Manks, 1 Cow. (N.Y.) 691."

In *Girard Trust Co. v. Vance,* 5 F.R.D. 109 (E.D. Pa. 1946), the *Turman Oil Company* case was cited with approval (p. 114):

"It is well understood that interpleader is an action conducted in two stages. First, the court must take evidence and determine whether the plaintiff is entitled to interplead the defendants. This is the issue upon which testimony has been taken and which is now before the Court. The second stage is between the different defendants on their adverse claims. See Turman Oil Co. v. Lathrop, D.C., 8 F. Supp. 870."

And in *Reconstruction Finance Corp. v. Aquadro,* 7 F.R.D. 406 (W.D. Pa. 1947), the *Girard Trust Company* case was followed (p. 409):

"An interpleader action involves two successive litigations; one between the claimant and the defendants as to whether the defendants shall interplead, and the other between defendants on conflict-

ing claims. Turman Oil Co. v. Lathrop et al., D.C., 8 F. Supp. 870.

"In other words, an 'interpleader' is an action conducted in two stages; first the Court must take evidence and determine whether the plaintiff is entitled to interplead the defendants, and the second stage is between the different defendants on their adverse claims. Girard Trust Co. et al. v. Vance et al., D.C., 5 F.R.D. 109."

What should be noted in all of these opinions[5] is the clear declaration, in each of them, that in the first stage of an interpleader case the question is solely that of determining whether the plaintiff has shown himself to be entitled to the benefits of the interpleader procedure. At the end of this stage, the Court must make a choice between only two possible judgments: on the one hand, a judgment for the plaintiff that he is entitled to an interpleader and, on the other hand, a judgment against him, that he is not so entitled and that his action shall be dismissed.

2. *At this stage, in a strict interpleader under the federal Statute, plaintiff's refusal to pay a sufficient sum into court can result only in a dismissal, on jurisdictional grounds.*

Under the federal interpleader Statute, Section 1335 of the Judicial Code of 1948 (28 U.S.C. 1335), it is a jurisdictional requisite, in an action of strict interpleader, that the plaintiff shall pay or be willing to pay

5. Compare *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934).

into court the entire amount which he holds as a stakeholder and which is in controversy between the defendants—or, the equivalent, that he shall file a bond conditioned upon payment of that amount to the defendant who shall ultimately prevail in the second stage of the case.

In *Edner v. Massachusetts Mutual Life Insurance Company,* 138 Fed. (2d) 327 (3 C.A. 1943), this rule of federal jurisdiction controlled the decision. In an interpleader brought under the federal Act, the plaintiff's complaint showed that it had issued a policy of life insurance; that the insured had become a bankrupt; that the cash surrender value of the policy was claimed by the trustee in bankruptcy, one of the defendants; and that this claim was disputed by another defendant, who asserted himself to be assignee for value of the policy. Plaintiff tendered, as its payment into court, only the cash surrender value of the policy. It was objected by the alleged assignee that this was not a tender of the whole amount in controversy—since he desired to keep the policy in force. The Court held (p. 330):

> "Section 24(26) provides that the district courts shall have jurisdiction of suits in interpleader if, inter alia, 'The complainant (a) has deposited such money * * * into the registry of the court, there to abide the judgment of the court; or (b) has given bond payable to the clerk of the court * * * conditioned upon the compliance by the complainant with the future order or decree of the court with respect to the subject matter of the controversy.' *The making of the deposit or giving of a bond is thus made a condition precedent to the acquisition by the court of jurisdiction to direct the extra territorial*

> *service of process upon a nonresident defendant and to take further steps in the cause.* Since in the present case a deposit was inappropriate and a bond was not filed the court was without jurisdiction to grant the preliminary injunction appealed from." (Italics supplied)

Although there appears to be no other authority upon this precise point of law (except, of course, the opinions of the courts below in this present case), the decision in the *Edner* case is sound in principle. It gives effect to the carefully chosen language of the federal Statute, and to the relevant legislative history of the Statute. And, since this Statute extended the jurisdiction of the federal courts to include a new class of case—cases in which there need be no diversity of citizenship between the plaintiff and all of the defendants, it seems clear that Judge Maris's analysis must be accepted and followed.

3. *And at this stage, in a strict interpleader, the plaintiff cannot be required, at the instance of any defendant, to increase his payment into court.*

In the *Edner* case, it may be observed, although the decision of the Court of Appeals held that the failure of the plaintiff to make a proper deposit in court had prevented the court from acquiring jurisdiction, it did not expressly direct a dismissal of the action. This is undoubtedly to be explained as a recognition by the Court of Appeals that the plaintiff should be given an opportunity to correct the jurisdictional defect, by filing its bond in the face amount of the insurance policy. The

same question was raised at an early stage of the case now at bar, by a motion to dismiss filed by the defendant IUE (CIO); and the District Court held that, should it later develop that the plaintiff Westinghouse had made an inadequate payment into court, it could and should be afforded an opportunity to make such additional payment as might be necessary to preserve the court's jurisdiction (see R. 75a).

But does this mean that a plaintiff which admits only a stakeholder's interest in one sum of money can be required, against his will and at the instance of a defendant, to pay a larger sum into court, and to abandon the status of stakeholder? Under the authorities, it does not. Instead, the plaintiff can at most be required to choose between making such deposit as the court shall find to be correct, or suffering an invountary dismissal of his interpleader action if he refuses to make the deposit. The court has jurisdiction only of such money or property as the plaintiff is willing to pay into court.

Thus, in *Loew's, Inc. v. Hoyt Management Corp.*, 83 Fed. Supp. 863 (D. N.Y. 1943), the court held as follows (pp. 865-866):

> "Plaintiff's motion for summary judgment is granted to the extent of restraining defendants from instituting any proceeding in any state or United State[illegible] against plaintiff to recover the moneys deposited in this court, and discharging plaintiff from further liability with respect thereto. 28 U.S.C.A. § 2361; Globe Indemnity Co. v. Puget Sound Co., D.C., 47 F. Supp. 43. No disposition is made at this time of plaintiff's claim insofar as it seeks to procure a determination with respect to

moneys which may hereafter become payable by plaintiff to Alderdice under the employment agreement, inasmuch as the court in this action has jurisdiction only to the extent that a fund has been deposited in the registry of the court. 28 U.S.C.A. § 1335."

Here, again, there seems to be only this one decision directly in point; but the holding of the *Loew's* case is consistent with the long established principle that interpleader is a remedy devised wholly for the benefit of the plaintiff stakeholder. See:

Sanders v. Armour Fertilizer Works, 292 U.S. 190, 200 (1934);

Texas v. Florida, 306 U.S. 398 (1939);

Massachusetts Mutual Life Insurance Co. v. Weinress, 47 Fed. Supp. 626 (D. Ill. 1942).

And this rule, that the interpleader remedy is intended simply to benefit the stakeholder, is a fair one as to the defendants; for in the absence of an interpleader any defendant is free to bring suit at his pleasure, in any court which can acquire jurisdiction of either the alleged stakeholder or the stake.

Using the present case as an example, the dismissal of the interpleader has renewed the plaintiff's risk of double vexation, or multiple vexation; but it has not prevented the UE from any assertion of its claims in the same or any other court. There is no suggestion in this case that the UE desires the security afforded by the plaintiff's payment into court; but if there were, the right to such security could not justly depend upon the presence or absence of an unrelated counterclaim.

It is true that a variant of the strict interpleader proceeding exists, known as the action in the nature of interpleader, in which the plaintiff is permitted to litigate his own claims to money or property, paid into court and subject also to the conflicting claims of two or more defendants. A plaintiff who chooses to do so may bring such an action in the nature of interpleader under the federal Statute: see the Statute itself, 28 U.S.C. 1335 and page 1c, *infra;* and *Texas v. Florida,* 306 U.S. 398 (1939). But there is no authority in the Statute or any decision to justify or support the proposition that a plaintiff who has commenced an action of strict interpleader can be forced to convert it into an action in the nature of interpleader. The *Edner* case and the *Loew's* case are to the contrary.

4. *Thus, the answer filed by the UE cannot be treated as an answer raising a counterclaim, under Rule 41 (a) (2).*

Considering this case in the light of the principles which have been described and discussed in the foregoing argument, it is submitted that the answer filed by the UE in the District Court cannot and should not be treated as an answer raising a counterclaim under Rule 41 (a) (2). Instead, it was and should be held an answer raising a jurisdictional contention which, had it been litigated and sustained, would have required the court to put the plaintiff to its election either to increase its payment into court or else to suffer the dismissal of the case.

In this situation, the position of the UE and the application of Rule 41 (a) (2) are not altered simply because the plaintiff has, without awaiting the court's

decision of the matter, made its election not to increase the payment into court, and has accordingly volunteered to dismiss the case.

Putting the same thing in another way, in the way the Court of Appeals put it (R. 218), the plaintiff made a tender of its payment into court as the basis of a proposed interpleader amongst the defendants. By its answer, the UE, one of the defendants, has rejected the amount tendered, as insufficient, and by so doing has questioned the court's power to discharge the plaintiff or to award an interpleader. In response, the plaintiff has determined to abandon this attempt to be discharged, and has accordingly asked leave to withdraw the tender and the action itself, leaving the UE, and every other defendant, free to pursue any remedy which could have been available had this case never been commenced.

Conclusion.

The petition for certiorari should be denied. If the *Edner* case, (138 Fed. (2d) 327), discussed at p. 24 *supra* is good law, the decision of the courts below was a natural and proper result of the UE's own pleading. There is no valid reason to question the authority of that case, or to broaden Rule 41 (a) (2) to forbid the discontinuance of such an action as this. The case presents no other point of any possible general importance.

Respectfully submitted,

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APPENDIX.

The Federal Interpleader Statute.

TITLE 28 U.S.C. 1335

§ 1335 Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

Federal Rules of Civil Procedure.

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof

* * * * * * *

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,524

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff-Appellee

v.

UNITED ELECTRICAL RADIO and MACHINE WORKERS OF AMERICA, et al.,
Defendants-Appellants

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS—CIO, et al.,
Defendants-Appellees.

Present: MARIS, GOODRICH and HASTIE, Circuit Judges.

Order.

Upon consideration of the written motion of defendants-appellees for an order directing the defendants-appellants to post additional bond or in the alternative for an order directing that the mandate of this court issue forthwith, and of the oral motion of the defendants-appellants for a stay of the mandate of this court and of the order of the district court dated July 11, 1951, and of the oral motion of the plaintiff-appellee for an order directing that the order of the district court dated May 26, 1950 be continued in effect until the mandate of this court issue, and after full hearing:

IT IS ORDERED:

1. That the order of the district court dated May 26, 1950, granting the plaintiff leave to pay money into court and restraining the prosecution of other suits by defendants be and it hereby is continued in effect until the issuance of the mandate of this court or until further order of this court.

2. That the mandate of this court be and it hereby is stayed.

3. That the order of the district court dated July 11, 1951, granting plaintiff's motion to dismiss its suit without prejudice, be and it hereby is stayed.

IT IS FURTHER ORDERED that the foregoing provisions of paragraphs 2 and 3 of this order are conditioned

(a) Upon the filing of a supersedeas and cost bond in the amount of Twenty Thousand ($20,000.00) Dollars in the district court together with a certified copy of this order; said bond to be in addition to the bond for Eighteen Thousand ($18,000.00) Dollars now filed in this proceeding.

(b) Upon the filing of a petition for writ of certiorari in the Supreme Court of the United States on or before April 21, 1952.

IT IS FURTHER ORDERED that if the petition for writ of certiorari shall have been filed on or before April 21, 1952 the issuance of the mandate of this court and the July 11, 1951 order of the district court shall be

further stayed until final disposition by the Supreme Court of the United States of the said petition for writ of certiorari.

BY THE COURT

HERBERT F. GOODRICH
Circuit Judge

April 10, 1952

A true copy

IDA O. CRESKOFF,

[SEAL] Clerk